NO. 16-157

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF IOWA,

Petitioner,

vs.

MARVIS LATRELL JACKSON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE IOWA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

Respectfully submitted,

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STATEMENT OF THE CASE

Marvis Jackson was convicted of two robberies after law enforcement officers conducted a search of an apartment where he was temporarily staying based upon a tenant's consent to search the premises. Pet. App. p. 2. Jackson was found partially naked and sleeping in a bedroom and was removed from the room on an outstanding warrant before officers obtained the tenant's consent to search the room. Pet. App. pp. 5-7. Officers searched a backpack near the mattress where Jackson had been sleeping and found evidence from the robberies. Pet. App. pp. 7-8. Officers made no inquiries into whether Jackson was staying in the apartment or whether anything in the room belonged to Jackson before conducting their search. Pet. App. pp. 5-7.

In a 4-3 decision, the Iowa Supreme Court held the Fourth Amendment to the United States Constitution invalidated the search. Pet. App. 42. Citing *Illinois v. Rodriguez,* 497 U.S. 177 (1990), the Court found the officers were faced with an ambiguity as to who owned the backpack and neglected to make any further inquiry. Pet. App. pp. 14-17, 35-42. The majority recognized that some jurisdictions require a defendant to affirmatively establish the existence of ambiguity, while others place the burden on the government to establish a lack of ambiguity. Pet. App. pp. 17-29. The majority sided with those jurisdictions placing the burden on the government. Pet. App. pp. 29-35. The dissenting justices agreed the burden was properly placed on the government, but deemed there was no ambiguity under the facts as presented. Pet. App. pp. 59-78.

Petitioner now asks this Court to essentially equate a third party's scope of consent to search a premises with his authority to consent to the search when it comes to searching closed containers. Pet. p. i. Petitioner believes such warrantless searches should be permitted unless ambiguity as to a third party's authority was "obvious." Pet. p.p. 25-26. Petitioner's position is inconsistent with *Rodriguez*, inconsistent with the history of requiring the State to establish the validity of warrantless searches, and would eviscerate a guest's privacy interests in items he brings into his host's home. The petition for certiorari should be denied.

A. Factual Background

On its de novo review, the Iowa Supreme Court found that on December 31, 2012, two black males with covered faces entered Gumby's Pizza in Iowa City. Pet. App. p. 3. The suspects pointed a gun at the clerk, obtained money, and ran northbound on Gilbert Street. Pet. App. p. 3.

Iowa City police officers Alex Stricker and Michael Smithey, along with a canine unit, followed footprints in the snow after a witness reported seeing two black males run by with money in their hands. Pet. App. p 3. The dog stopped near a building that contained apartments on the second floor, where Smithey observed a black male watching from one of the apartment windows above. Pet. App. p. 4. When the officers attempted to make contact with the occupants, the light in the apartment went off and the door locked. Pet. App. p. 4. The officers knocked and announced their presence. Pet. App. p. 4.

Wesley Turner answered the door and, when asked, said only he, his girlfriend Alyssa Miller, and Gunnar Olson were present. Pet. App. p. 4. Turner told officers Olson was asleep, but brought Olson to speak with them at their request. Pet. App. pp. 4-5. Olson told Smithey that only he, Turner, and Miller lived in the apartment. Pet. App. p. 5. When Smithey asked if he could look in Olson's room, Olson then said he had gone to sleep after getting off work and woke to his cousin Marvis asleep next to him. Pet. App. p. 5. Olson later said he did not know Marvis' last name and admitted they were not really cousins. Pet. App. p. 5. Smithey did not ask Olson if Jackson had been staying at the apartment. Pet. App. p. 5.

In the bedroom, officers observed Marvis Jackson, wearing only pajama bottoms and lying on an air mattress apparently sleeping. Pet. App. p. 5. Olson attempted to awaken Jackson, which Smithey thought "was considerably more difficult than it should have been." Pet. App. p. 5. Jackson identified himself to officers, but said he had no identification. Pet. App. p. 6. Jackson was not asked if he was staying in the apartment, was an overnight guest, or had any belongings in the apartment. Pet. App. p. 6. Smithey confirmed that Jackson had an active arrest warrant, removed him from the room, and turned him over to another officer. Pet. App. p. 6.

After Jackson was removed from the apartment, Olson consented to a search of his bedroom. Pet. App. pp. 6-7. Neither Stricker nor Smithey asked Olson if Jackson had been staying in the apartment or if he had any belongings in the

bedroom. Pet. App. p. 7.

After searching around the air mattress, Smithey grabbed a closed backpack that was a few feet away from the air mattress near the closet. Pet. App. p. 7. Smithey saw no obvious identification on the outside of the bag. Pet. App. p. 7. He opened the bag to find a wallet – which he laid on a chair and did not open –, a pair of dark-colored jeans that were wet around the cuffs, and a black handgun. Pet. App. pp. 7-8. Smithey then opened the wallet and found Jackson's identification. Pet. App. p. 8. He photographed the gun and stopped the search, instructing the others that they were locking down the apartment to apply for a search warrant. Pet. App. p. 8.

It was only after the group was taken to the police station for questioning that Miller, Turner, and Jackson all confirmed that Jackson had been staying at the apartment for several weeks prior to the robbery, and that he had personal belongings in the apartment. Pet. App. p. 9.

B. Procedural Background

Respondent generally agrees with Petitioner's recitation of the procedural background of this case, with a few clarifications.

1. The "unanimous" decision of the Iowa Court of Appeals was a unanimous decision of a three-judge panel. Pet. App. p. 87. Respondent clarifies that there are nine judges on the Iowa Court of Appeals. Iowa Code § 602.5102(1) (2015).

2. On further review, the Iowa Supreme Court began its analysis by making the unremarkable statement that the government bears the burden of proving a

warrant was not necessary to justify a warrantless search. Pet. App. p. 12. The conduct of the officers involved would be reviewed using an objective standard. Pet. App. p. 12.

The Court recognized an officer could rely on a third party's actual or apparent authority to consent to the search. Pet. App. pp. 12-13. Because the State of Iowa conceded Olson did not have actual authority to consent to a search of the backpack, the Court considered Olson's apparent authority to do so. Pet. App. pp. 14, 35.

Relying upon *Illinois v. Rodriguez*, 497 U.S. 177 (1990), the Court determined officers were required to make "reasonable, not perfect, factual determinations concerning the scope of authority possessed by a person who consents to a search." Pet. App. p. 15. Where surrounding circumstances would lead a reasonable person to question whether the consenting party had the requisite authority, a warrantless entry or search without further inquiry would be unlawful. Pet. App. p. 16. The Court noted that *Rodriguez* placed the burden of establishing effective consent on the government. Pet. App. pp. 16-17.

The Court acknowledged the United States Supreme Court had yet to address whether *Rodriguez*'s duty of inquiry applied to the search of closed containers within a residence. Pet. App. p. 17. The Court noted a split in the circuit courts of appeals as to whether the burden of proof regarding ambiguity should fall upon the government or the defendant. Pet. App. pp. 17-29. Ultimately, the Iowa Supreme Court determined it was most appropriate to place the burden of

proof on the government given the holding of *Rodriguez*, the government's traditional burden to justify warrantless searches, and a guest's privacy interest in personal belongings he brings into a host's home. Pet. App. pp. 29-35.

3. The dissenting justices held there was "no question" that *Rodriguez* placed the burden on the government to prove the consenting party had actual or apparent authority. Pet. App. p. 59. Furthermore, the dissent clarified that "[n]one of the authorities cited by the majority stand for the proposition that the defendant must come forward with evidence to show the officer could not have reasonably relied on the third-party consent." Pet. App. p. 59. The outcome of each case, according to the dissent, will depend on the objective review of the facts of each case. Pet. App. pp. 58-59.

4. It is the interpretation of the facts surrounding the search of Jackson's backpack where the majority and dissent parted ways. The majority found ambiguity because 1) Jackson was an overnight guest, 2) officers should have known Jackson had clothes other than his pajama pants in the apartment, 3) Jackson's clothes were likely in the room where he was sleeping, and 4) Olson made statements suggesting there were items in his room that did not belong to him. Pet. App. pp. 35-42. The majority determined the officers did not make any inquiry to clear up the ambiguity arising from these circumstances. Pet. App. pp. 39-40.

The dissent, meanwhile, found no ambiguity in Olson's authority to consent to a search of his room. The dissent faulted the majority for "blindly accept[ing] the statements made by Turner, Olson, and Miller, even in the face of their obvious

incredibility and dishonesty," yet relied upon their statements that no one else lived there to render the officers' belief in Olson's authority to consent to the search of the backpack as reasonable. Pet. App. pp. 68, 70. The dissent also found the situation unambiguous, in large part, because the scene as officers found it was consistent with Jackson having just fled the scene of a robbery. Pet. App. pp. 69-72. In other words, the purpose of the search coupled with the circumstances presented in the apartment would give officers no reason to believe Jackson was an overnight guest or that the backpack belonged to him. Pet. App. pp. 69-72.

REASONS FOR DENYING THE PETITION

I.

Petitioner's Claim of a "Deep Division" Is Illusory.

The Fourth Amendment to the United States Constitution protects individuals against unreasonable searches and seizures. U.S. Const. amend IV. The warrantless search of an individual's home is ordinarily considered presumptively unreasonable. *Payton v. New York*, 445 U.S. 573, 586 (1980). Furthermore, Fourth Amendment protections extend to people, not places, and apply to items a person "seeks to preserve as private, even in an area accessible to the public." *Katz v. United States*, 389 U.S. 347, 351 (1967). This may include items an individual chooses to store at another's residence. *United States v. Karo*, 468 U.S. 705, 726 (1984)(O'Connor, J., concurring)("Insofar as it may be possible to search the container without searching the home, the homeowner suffers no

invasion of his privacy when such a search occurs; the homeowners also lack the power to give effective consent to the search of the closed container.").

Although warrantless searches are generally prohibited, one established exception to the warrant requirement is a search based on consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). Consent may come from those who have common authority to consent. *United States v. Matlock*, 415 U.S. 164, 171, (1974). Common authority rests "on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." *Id.* n.7.

Apparent authority to search will suffice under the Fourth Amendment because law enforcement need not always be correct in their determination that someone had the authority to consent, but the officers must "always be reasonable." *Illinois v. Rodriguez*, 497 U.S. 177, 185 (1990). When there is a claim of authority by a third party, however, "the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry." *Id.* at 188. The standard is an objective one:

> "[W]ould the facts available to the officer at the moment ... 'warrant a man of reasonable caution in the belief" that the consenting party had authority over the premises? If not, then warrantless entry without further inquiry is unlawful unless authority actually exists. But if so, the search is valid.

Id. (quoting *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968)).

Because *Rodriguez* involved third-party consent to search a room where the illegal items were in plain view, the *Rodriguez* Court did not specifically address the question of whether the third-party consent was valid as to closed containers within the residence. *Id.* at 180. Petitioner claims this has led to a "deep division" among lower courts as to whether the Fourth Amendment likewise imposes a duty of inquiry upon officers when there is ambiguity as to the ownership of closed containers. Pet. pp. 12-19. Respondent respectfully contends any claim of a "deep division" is illusory.

A. Federal Circuit Courts of Appeals

1. Circuits Requiring Defendants to Establish Ambiguity

Petitioner cites the Seventh Circuit as taking the position that police should be permitted to inspect closed containers unless an ambiguity as to ownership is obvious and dedicates significant time to discussing *United States v. Melgar*. Pet. pp. 13-14. *United States v. Melgar*, 227 F.3d 1038 (2000). Petitioner's effort is all for naught as *Melgar's* holding has been placed into question by more recent cases.

Melgar involved the search of a purse in a motel room after a third party – the renter of the room – had given consent to search the room. *Id.* at 1309. An officer held up the purse and asked someone to claim ownership of it, but no one did. *Id.* Contraband was discovered upon a search of the purse. *Id.*

The *Melgar* Court posited the "real question for closed container searches [as] which way the risk of uncertainty should run." *Id.* at 1041. Were police required to have "positive knowledge" that the third party had authority to consent to the

search of the purse, or was the search permissible if the police did not have "reliable information that the container is *not* under the authorizer's control"? *Id.* The *Melgar* Court was not willing to accept the "strict view" of positive knowledge and found it sufficient that police had "no reason to know" the purse did not belong to the woman who authorized the search. *Id.*

It is worth noting that the *Melgar* Court specifically explained "Our conclusion here rests in part on the discussion in *Houghton* that indicates the container rule rests on general principles of Fourth Amendment law that do not depend on the special attributes of automobile searches." *Id.* at 1042 (citing *Wyoming v. Houghton*, 526 U.S. 295, 302 (1999)). This was a reference to *Houghton*'s reliance on probable cause to search an automobile for contraband as a basis for searching closed containers in the vehicle that might contain contraband. *Wyoming v. Houghton*, 526 U.S. 295, 302 (1999). *Houghton* was a probable cause case and not a consent case. *Houghton* and *Melgar* are therefore unhelpful in an analysis of the question presented.

Furthermore, the precedential value of *Melgar* in the Seventh Circuit is questionable. In 1996, the Seventh Circuit held that *Rodriguez* "imposes on law enforcement officers a duty to inquire further as to a third party's authority to consent to a search if the surrounding circumstances make that person's authority questionable." *Montville v. Lewis*, 87 F.3d 900, 903 (7th Cir. 1196). In the 2006 case of *United States v. Goins*, the Seventh Circuit recognized *Montville* and that it had to determine whether officers had "a duty to inquire further before accepting [the

consenting party's] representations." *United States v. Goins*, 437 F.3d 644, 649 (7th Cir. 2006). Ultimately, the *Goins* Court determined the officers in that case fulfilled their obligations to verify the consenter's authority to search. *Id. See also United States v. Basinski*, 226 F.3d 829 (7th Cir. 2000)(apparent authority relies not on consenting party's mere possession of closed container, but on government's knowledge of consenting party's use of, control over, and access to container).

Respondent concedes that the Second Circuit has fairly consistently held to the rule that a third-party's apparent authority to consent to a search of a room permits a search of items found in the room "with the exception of those 'obviously' belonging to another person," and that the defendant has the burden to provide evidence that the items "were obviously and exclusively his." *United States v. Snype*, 441 F.3d 119, 136 (2d Cir. 2006). Notably, *Snype* does not refer to *Rodriguez* but to *United States v. Zapata-Tamallo*, which in turn is based on *United States v. Isom*. *See id.* at 136-37; *United States v. Zapata-Tamallo*, 833 F.2d 25, 27 (2d Cir. 1987); *United States v. Isom*, 588 F.2d 858, 861 (2d Cir. 1978).

In *Isom* – decided years before *Rodriguez* – a tenant gave police consent to search a locked box belonging to the defendant, who was a guest in her apartment. *United States v. Isom*, 588 F.2d 858, 860 (2d Cir. 1978). The Second Circuit questioned whether the tenant had authority to consent to the search of the box, and was troubled by the prospect of using the third-party consent doctrine to vitiate a guest's reasonable expectation of privacy in items they bring into a host's home. *Id.* at 861. In dicta, the *Isom* Court held "the police might reasonably conclude that

appellant did not own the box and Ames' consent included within its scope the search of the box." *Id.* The Court's decision was more motivated, however, by Isom's specific disclaimer of ownership of the box and the fact that police had probable cause to seize the box. *Id.* The Second Circuit's intra-circuit case history renders its decisions irrelevant to a discussion of *Rodriguez*'s application to closed containers.

2. Circuits Requiring Officers to Inquire in Light of Ambiguity

Respondent agrees that the Sixth Circuit has consistently applied *Rodriguez* to impose a duty of inquiry upon police officers when there is ambiguity as to whether a third-party who has consented to a search of an area has apparent authority over closed containers within that area. *United States v. Taylor*, 600 F.3d 678 (6th Cir. 2010); *United States v. Purcell*, 526 F.3d 953 (6th Cir. 2008); *United States v. Waller*, 426 F.3d 838 (6th Cir. 2005).

Petitioner makes much of the dissenting opinion in *Taylor*, which referred to a "circuit split" with the Second and Seventh Circuits on one side of the issue while negating to mention the circuits on the other side. *United States v. Taylor*, 600 F.3d 678, 686 (6th Cir. 2010)(Kethledge, J. dissenting). The dissent also referred to "appreciable entropy among the circuits" for lack of Supreme Court guidance. *Id.* As discussed in this section, however, any entropy among the circuits is hardly appreciable, and what entropy there may be can be resolved within the circuits.

Petitioner also takes issue with the Sixth Circuit's supposed resurrection of the "'superstructure rejected in *Jimeno*.'" Pet. p. 14. Petitioner neglects to point out

that *Florida v. Jimeno* involved the consent search of Jimeno's automobile and that *Jimeno* did not involve any issue of third-party consent. *See generally Florida v. Jimeno*, 500 U.S. 248 (1991). Additionally, as several courts have aptly noted, *Jimeno* addressed an officer's reasonable interpretation of a driver's *scope* of consent, not a driver's *authority* to consent. *State v. Westlake*, 353 P.3d 438, 443 n.1 (Idaho Ct. App. 2015); *Norris v. State*, 732 N.E.2d 186, 189 (Ind. Ct. App. 2000).

Petitioner fails to mention the D.C. Circuit in its analysis. In *United States v. Peyton*, the D.C. Circuit recognized *Rodriguez*'s holding that police can rely on apparent authority for consent to search so long as the officers' factual determinations were reasonable. *United States v. Peyton*, 745 F.3d 546, 552 (D.C. Cir. 2014). But merely having common authority over a house does not mean that person also has authority over closed containers within the house, particularly in the case of shared spaces. *Id.* "Apparent authority does not exist where it is uncertain that the property is in fact subject to mutual use." *Id.* at 554. Where ambiguity exists, police have a duty of further inquiry. *Id.* (citing *United States v. Taylor*, 600 F.3d 678, 680-85 (6th Cir. 2010); *United States v. Whitfield*, 939 F.2d 1071, 1075 (D.C.Cir. 1991).

Likewise, Petitioner neglects to discuss *United States v. Salinas-Cano*, in which the Tenth Circuit held it was the government's burden to come forward with evidence establishing authority over a closed container. *United States v. Salinas-Cano*, 959 F.2d 861, 864 (10th Cir. 1992). Disagreeing with the lower court's finding that there was no evidence to negate the tenant's authority to consent to a search of

items in the apartment that did not belong to her, the Tenth Circuit judges held "[o]wnership and control of property does not automatically confer authority over containers within it." *Id.* at 865. Rather, the proper question was whether there was any evidence to establish that the tenants had mutual use of or joint interest and control over the luggage at issue. *Id.* The officer knew the apartment was rented by the tenant and that the luggage belonged to Salinas-Cano, but failed to ask questions clarifying the tenant's mutual control over the luggage, therefore rendering the apparent authority doctrine inapplicable. *Id.* at 866.

Finally, Petitioner places the Ninth Circuit in support of Iowa's position. Pet. p. 15. Petitioner correctly recognizes, however, that *United States v. Arreguin* did not address the question presented. *United States v. Arreguin*, 735 F.3d 1168 (9th Cir. 2013). *Arreguin* did little more than apply *Rodriguez* to the factual and legal context *Rodriquez* specifically addressed – the duty of police to inquire when there is an ambiguity as to whether an apartment's resident has apparent authority to consent to the search of a room in the apartment. *Id.* at 1178. Assessing whether, as Petitioner suggests, the Ninth Circuit would extend this holding to close containers within a residence would be an exercise in speculation and remains a question best addressed to the Ninth Circuit.

3. Summary

There is no "deep division" among the circuit courts of appeals. The Second Circuit is an extreme outlier, placing an affirmative burden on the defendant to establish ambiguity based upon intra-circuit cases and not upon *Rodriguez*. The Seventh Circuit's decision in *Melgar* is less extreme than that adopted in the Second Circuit, but has been placed into question by later cases. The D.C., Sixth, and Tenth Circuits have adopted the position Iowa has taken, and that position is consistent with and a logical expansion of *Rodriguez*.

B. State Courts

Petitioner also cites to various cases that, it claims, show a split of authority among the state courts. Once again, any supposed split is illusory.

At most, the state cases that Petitioner claims follow the Seventh Circuit's holding in *Melgar* appear to base the reasonableness of an officer's acceptance of third-party consent to search on whether a present defendant claimed ownership of the item or objected to the search. *People v. Trevino*, 2011 WL 9692696 at *3 (Ill. Ct. App. May 27, 2011); *State v. Sawyer*, 784 A.2d 1208, 1213 (N.H. 2001); *State v. Maristany*, 627 A.2d 1066, 1070 (N.J. 1993); *Glenn v. Commonwealth*, 654 S.E.2d 910, 136-37 (Va. 2008). The defendant in *Maristany* never even claimed ownership of the container on appeal. *State v. Maristany*, 627 A.2d 1066, 1069 (N.J. 1993). In *Pennington v. State*, meanwhile, the defendant specifically told police the gun was located in a duffle bag in the house where his wife was staying, and both he and his wife consented to the search. *Pennington v. State*, 913 P.2d 1356, 1362, 1368 (Okla.

Ct. Crim. App. 1995). These cases are unhelpful in addressing the situation here, where Jackson was taken from the room prior to officers obtaining consent to search.

Petitioner cites to *State v. Sawyer* and *State v. Maristany* for the proposition that ambiguity will not defeat the consent to search given by an occupant of a vehicle. *State v. Sawyer*, 784 A.2d 1208 (N.H. 2001); *State v. Maristany*, 627 A.2d 1066 (N.J. 1993). Both cases nonetheless recognize that an officer should make inquiry if ownership of the container is ambiguous. *State v. Sawyer*, 784 A.2d 1208, 1212 (N.H. 2001); *State v. Maristany*, 627 A.2d 1066, 1069 (N.J. 1993). In a companion cases to *Maristany*, the New Jersey Supreme Court held "the preferred procedure for law-enforcement officers seeking consent to search one of several pieces of luggage in a car with more than one occupant is for the officers to determine which occupant owns each item of luggage, so that the officers' reliance on consent to search may be justifiable." *State v. Suazo*, 627 A.2d 1074, 1077-78 (N.J. 1993).

Other cases cited by Petitioner in favor of the *Melgar* approach do not address *Rodriguez* as much as they address common authority to search or the scope of consent to search. *See generally State v. Jones*, 589 S.E.2d 374 (N.C. Ct. App. 2003)(relying upon *Florida v. Jimeno* and *United States v. Matlock* to find driver had common authority over passenger's jacket left in car); *State v. Odom*, 722 N.W.2d 370 (N.D. 2006)(scope of defendant's consent to search hotel room reasonably included locked safe).

The state cases that have joined Iowa in following a "duty of inquiry" approach recognize the difference between *scope* of consent and *authority* to consent. *State v. Westlake*, 353 P.3d 438, 443 n.1 (Idaho Ct. App. 2015); *Norris v. State*, 732 N.E.2d 186, 189 (Ind. Ct. App. 2000). Thus, a person's consent to the search of her motel room could reasonably lead officers to believe the scope of her consent included containers within the room, but would not necessarily mean that she had authority to consent to the search of an item in the room they have reason to believe does not belong to her. *State v. Westlake*, 353 P.3d 438, 443 n.1 (Idaho Ct. App. 2015). These cases adhere to the uncontroversial notion that when officers equate the scope of an individual's consent as authority to consent to search of items belonging to another, the officers commit a mistake of law. *See, e.g., State v. Edwards*, 570 A.2d 193 (Conn. 1990); *Commonwealth v. Brooks*, 388 S.W.3d 131, 135-136 (Ky. Ct. App. 2012); *State v. Frank*, 650 N.W.2d 213, 218-19 (Minn. Ct. App. 2002); *People v. Gonzalez*, 667 N.E.2d 323, 326-27 (N.Y. Ct. App. 1996).

C. Need for further development of the law

According to Respondent's analysis, five circuit courts have directly addressed the issue presented, with only one circuit – based on its intra-circuit jurisprudence – definitively taking the position favored by Petitioner. More than half of the circuit courts have yet to address the question presented herein.

It is also worth noting that the decisions from the circuit courts of appeals are not en banc, but panel decisions. One cannot predict how a full circuit might approach the issue. This appears particularly true in the Seventh Circuit, where

decisions have been somewhat mixed. It is generally the duty of the full circuit court, not the Supreme Court, to resolve any conflicts among circuit panel decisions. *Cf. Davis v. United States*, 417 U.S. 333, 340 (1974)(petition for certiorari denied after Solicitor General urged the intra-circuit conflict should be resolved by the Ninth Circuit).

Finally, many of the state cases cited by Petitioner are decisions from the states' intermediate appellate courts. State *v. Westlake*, 353 P.3d 438 (Idaho Ct. App. 2015); *Norris v. State*, 732 N.E.2d 186 (Ind. Ct. App. 2000); *Commonwealth v. Brooks*, 388 S.W.3d 131, 135-136 (Ky. Ct. App. 2012); *State v. Frank*, 650 N.W.2d 213 (Minn. Ct. App. 2002); *State v. Jones*, 589 S.E.2d 374 (N.C. Ct. App. 2003); *Pennington v. State*, 913 P.2d 1356 (Okla. Ct. Crim. App. 1995). One case is, in fact, an unpublished opinion from the Illinois Court of Appeals and, as such, has no precedential value. *People v. Trevino*, 2011 WL 9692696 (Ill. Ct. App. May 27, 2011); Ill. R. S. Ct. 23(e)(1) (2016). One cannot know how the highest court in these states would address the issue. The state supreme courts should be given the opportunity to do so.

II.

The Question Presented Does Not Compel the Grant of Certiorari. Petitioner Overstates the Impact.

Illinois v. Rodriguez was decided in 1990. In the 26 years since, most of the relatively few jurisdictions that have addressed the question presented have simply applied the reasoning of *Rodriguez* to the factual circumstances before them.

The critical question in these cases is ultimately a factual one: Were the circumstances at the time of the search sufficiently ambiguous that a reasonable officer should have made further inquiry? This is why the dissent departed from the majority in the case below. The justices did not disagree on the law, but on whether the facts created an ambiguity and thereby an obligation for further inquiry. Pet. App. pp. 33-42, 59-78. Where the ruling below is inherently fact-bound, review by this Court is not warranted. Sup. Ct. R. 10.

Furthermore, Petitioner overstates the impact of those cases extending *Rodriguez* to the search of closed containers. Jurisdictions applying *Rodriguez* to closed containers have often placed limitations on when an officer is reasonably expected to make further inquiry. *See, e.g., United States v. Basinski*, 226 F.3d 829, 834-35 (7th Cir. 2000)(analysis may consider the nature of the container, external markings on the container, and precautions taken to ensure privacy); *United States v. Salinas-Cano*, 959 F.2d 861, 864(10th Cir. 1992)(same); *State v. Westlake*, 353 P.3d 438, 444-45 (Idaho Ct. App. 2015)(acknowledging nature of container is important to analysis, including whether container is one normally used to store personal effects); *People v. Gonzalez*, 667 N.E.2d 323, 325 (N.Y. Ct. App. 1996)(guest's interest in closed container of particular relevance when container is "an article customarily used to hold one's most personal belongings"). Consistent with these jurisdictions, the Iowa Supreme Court remarked that the backpack at issue "is the sort of container a person staying overnight in a place other than his or her home might use to hold clothing and other personal items." Pet. App. 39.

Finally, Petitioner is asking this Court to overturn the decision of the Iowa Supreme Court out of fear that criminals will escape punishment. The Fourth Amendment is concerned with balancing legitimate governmental interests against "the degree to which [the search] intrudes upon an individual's privacy." *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999). But even "[u]rgent government interests are not a license for indiscriminate police behavior." *Maryland v. King*, ___, U.S. ___, ___, 133 S. Ct. 1958, 1970 (2013). This must be particularly true where, as here, no judicial involvement constrained the actions of officers acting without probable cause. An individual's legitimate privacy interests in their personal belongings should not be extinguished by excusing officers' willful ignorance when presented with an ambiguous factual scenario. *State v. Maristany*, 627 A.2d 1066, 1071 (N.J. 1993)(Pollock, J., concurring in part and dissenting in part)(allowing officers to assume authority without inquiry "puts a premium on ignorance").

It is not too much to ask to have officers – who are supposedly trained in investigation – ask one simple clarifying question when it is unclear as to who owns an item they wish to search. This was the ultimate holding in *Rodriguez*: If the facts presented to the officer would lead a reasonable person to believe the consenting party had authority to authorize a search, the search was valid; if not, the search was invalid unless further inquiry was made. *Illinois v. Rodriguez*, 497 U.S. 177, 188-89 (1990). *Rodriguez* places the burden on officers, not defendants, to assume the risk when a person's authority to consent to a search is unclear.

III.

This Case is Not the "Ideal Vehicle" to Resolve Any Underlying Legal Issue. Jackson's Case Ultimately Turns on Determinations of Fact, Not Law.

The justices of the Iowa Supreme Court were not split on any legal issue. They agreed that the State had the burden to prove that the officers' acceptance of Olson's apparent authority to search the backpack was reasonable. Pet. App. pp. 33-35, 59. The difference of opinion came down not to what the law required, but whether the surrounding circumstances rendered Olson's authority to search ambiguous.

Petitioner makes much of the fact that the majority found ambiguity "though no restrictions had been placed on the scope of the search and the defendant never claimed to own anything in the room before being removed when arrested." Pet. p. 25. Again, Petitioner confuses scope of consent with authority to consent. The two are not synonymous, and Olson's scope of consent does not establish his authority to consent to the search of another person's belongings. *See, e.g., United States v. Freeman,* 482 F.3d 829, 832 (5th Cir. 2007); *State v. Westlake,* 353 P.3d 438, 443 n.1 (Idaho Ct. App. 2015).

Furthermore, Petitioner should not be allowed to complain that Jackson never indicated an ownership interest in any items in the room prior to his arrest when officers never asked him to do so. Had an officer asked Jackson if he had any belongings in the room and Jackson specifically disclaimed any such ownership, the officer's reliance on such disclaimer would be objectively reasonable. *See, e.g.,*

United States v. Freeman, 482 F.3d 829, 834 (5th Cir. 2007); *United States v. Isom*, 588 F.2d 858, 861 (2d Cir. 1978). But Jackson was never presented with an opportunity to either claim or disclaim the backpack. In fact, Jackson was removed from the apartment before Olson was ever asked to consent to a search of the room.[1] Thus, this case is unlike *Sawyer*, *Maristany*, *Glenn*, and *Trevino*, where the defendants were present but failed to object to the search. *People v. Trevino*, 2011 WL 9692696 at *3 (Ill. Ct. App. May 27, 2011); *State v. Sawyer*, 784 A.2d 1208, 1213 (N.H. 2001); *State v. Maristany*, 627 A.2d 1066, 1070 (N.J. 1993); *Glenn v. Commonwealth*, 654 S.E.2d 910, 136-37 (Va. 2008).

Finally, Respondent feels obliged to point out that, even if this Court were to grant certiorari and reverse the decision of the Iowa Supreme Court, any such decision may not mean the ultimate resolution of Jackson's case.

On appeal, Jackson contended that the search violated not only the Fourth Amendment to the United States Constitution, but Article I Section 8 of the Iowa Constitution. Pet. App. p. 11. The majority opinion did not address these arguments because it was reversing Jackson's convictions on Fourth Amendment grounds. Pet. App. pp. 42-44. The three dissenting justices specifically held that they would not diverge from federal precedent in interpreting the Iowa Constitution and therefore rejected any state constitutional challenge. Pet. App. pp. 78-86. One

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[1]. The purposeful removal of a co-tenant to prevent objection to a search is not at issue in this case. *Georgia v. Randolph*, 547 U.S. 103, 121-22 (2006).

concurring justice would have reversed Jackson's convictions based on a violation of Article I Section 8 of the Iowa Constitution. Pet. App. pp. 44-50.

Should this Court reverse the decision by the Iowa Supreme Court and remand the case for further proceedings, it is possible, if not probable, that the Iowa Supreme Court could uphold its suppression ruling on independent state grounds. *See generally Racing Ass'n of Central Iowa v. Fitzgerald*, 675 N.W.2d 1 (Iowa 2004)(applying federal equal protection principles in independent fashion under Iowa Constitution following reversal by United States Supreme Court). When it comes to the area of search and seizure, the Iowa Supreme Court has been particularly open to an independent interpretation of the Iowa Constitution. The Court has provided increased protections for probationers and parolees and has rejected the good faith exception to the exclusionary rule. *State v. Short*, 851 N.W.2d 474, 505-06 (Iowa 2014)(warrantless search of probationer's residence invalid under state constitution); *State v. Ochoa*, 792 N.W.2d 260, 291 (Iowa 2010)(rejecting, under Iowa Constitution, warrantless searches of parolees permitted under *Samson v. California*, 547 U.S. 843 (2006)); *State v. Cline*, 617 N.W.2d 277, 292-93 (Iowa 2000)(rejecting "good faith" exception to exclusionary rule adopted in *United States v. Leon*, 468 U.S. 897(1984)), abrogated on other grounds by *State v. Turner*, 630 N.W.2d 601, 606 n.2 (Iowa 2001)(scope of review). The Court has emphasized the sanctity of the home from warrantless intrusions, and has at least suggested a more stringent standard for valid consent. *See, e.g., State v. Short*, 851 N.W.2d 474, 503 (Iowa 2014)("Even if we were inclined to fuzzy up the

warrant requirement, a home invasion by law enforcement officers is the last place we would begin the process."); *State v. Pals*, 805 N.W.2d 767, 777-82 (Iowa 2011)(discussing, without deciding, whether Iowa Constitution would require a knowing and voluntary waiver of search and seizure rights for effective consent).

Accordingly, Respondent suggests this case is not the best vehicle to address the question presented.

IV.

The Iowa Supreme Court's Decision Was Correct.

Petitioner argues that the Iowa Supreme Court's framework was not compelled by *Illinois v. Rodriguez*. Pet. p. 25. It was, however, informed by *Rodriguez* and consistent with *Rodriguez*.

Petitioner criticizes the Iowa Supreme Court for focusing upon the burden of proof. Pet. pp. 25-26. While the majority opinion did recognize a split in the circuit courts of appeals as to whether it was incumbent upon the State to dispel ambiguity or upon the defendant to affirmatively establish ambiguity, ultimately all of the Justices agreed that any burden of proof fell upon the State. Pet. App. pp. 29-35, 59. This is consistent with Fourth Amendment jurisprudence that places the burden on the State to establish a valid exception to the warrant requirement and to establish the effectiveness of third-party consent. *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984)("the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to

all warrantless home entries"); *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990)("The burden of establishing that common authority rests on the State.").

Petitioner contends *Rodriguez*'s "totality of the circumstances" test is best exemplified by the analysis in *Snype*, *Melgar*, and *Trevino*. Pet. pp. 25-26. Respectfully, those cases do not analyze the "totality of the circumstances" as much as presume that a person who has common authority to consent to the search of a residence likewise has authority to consent to a search of all containers within the residence. In other words, the existence of apparent authority is either black or white – never gray. *State v. Westlake*, 353 P.3d 438, 443 (Idaho Ct. App. 2015)("In our opinion, the *Melgar* approach is based on a false premise – that apparent authority must either be never present or always present whenever the evidence as to actual authority is not explicit."). *Snype* goes even further by placing the burden to establish ambiguity on the defendant – a proposition wholly inconsistent with Fourth Amendment jurisprudence. *United States v. Snype*, 441 F.3d 119, 136 (2d Cir. 2006).

The cases proffered by Petitioner improperly conflate scope of consent with authority to consent. *United States v. Freeman*, 482 F.3d 829, 832 (5th Cir. 2007); *State v. Westlake*, 353 P.3d 438, 443 n.1 (Idaho Ct. App. 2015); *Norris v. State*, 732 N.E.2d 186, 189 (Ind. Ct. App. 2000). It may well be that an officer believes an apartment tenant has authority to consent to the search of his apartment and that the scope of his consent includes containers within the apartment. The scope of that consent, however, does not address whether the tenant has actual or apparent

authority to consent to a search of a container in the apartment that belongs to another person. To equate scope of consent with authority to consent would completely eviscerate any notion of an expectation of privacy in personal belongings an overnight guest might have in his host's home. It would call into doubt this Court's holdings in *Minnesota v. Olson*, 495 U.S. 91, 96-100 (1990) and *United States v. Karo*, 468 U.S. 705, 726 (1984)(O'Connor, J., concurring).

The Idaho Court of Appeals characterized *Melgar* and *Snype* as creating "a bright-line rule where *Rodriguez* calls for a case-by-case approach that takes into consideration the totality of the circumstances to determine a consenter's apparent authority over a place to be searched." *State v. Westlake*, 353 P.3d 438, 443 (Idaho Ct. App. 2015). This case-by-case approach is the approach taken by the Iowa Supreme Court. The central question is still one of ambiguity and whether the totality of the circumstances would have prompted a reasonable person to make further inquiry.

While the reasonableness of an officer's actions may be a question of law, "the determination of apparent authority is fact-driven." *Id.* at 442. There was ample evidence in the record to permit the Iowa Supreme Court to find that officers were faced with an ambiguity as to who owned the backpack when they conducted the search of the apartment.

When officers asked Turner, Miller, and Olson who lived in the apartment, they answered that they were the residents. Pet. App. pp. 4-5. None of the three volunteered that Jackson was also present in the apartment. Pet. App. pp. 4-5.

When Smithey asked if he could look in Olson's room, Olson only then acknowledged that he woke to his "cousin Marvis" sleeping next to him. Pet. App. p. 5. Even though this information was contrary to what officers had been previously told, Smithey did not ask Olson to clarify if Jackson had been staying at the apartment or for any other details regarding his presence. Pet. App. p. 5.

Jackson was in the bedroom, shirtless, wearing pajama bottoms, and lying on an air mattress apparently sleeping. Pet. App. p. 5. Jackson identified himself to officers, but said he had no identification. Pet. App. p. 6. Jackson was not asked if he had any belongings in the apartment. Pet. App. p. 6. Smithey confirmed that Jackson had an active arrest warrant, removed him from the room, and turned him over to another officer. Pet. App. p. 6.

After Jackson was removed from the apartment, Olson reiterated that Jackson showed up while he was sleeping. Pet. App. p. 6. Stricker did not ask Olson if Jackson had been staying in the apartment. Pet. App. p. 6. Stricker asked Olson for consent to search the room for guns and any evidence of the robbery. Pet. App. pp. 6-7. Smithey returned to the room, but neither officer asked whether any of the items in the room might belong to Jackson before beginning their search. Pet. App. p. 7.

After searching around the air mattress, Smithey grabbed a closed backpack that was a few feet away from the air mattress where Jackson had been lying. Pet. App. p. 7. Smithey saw no obvious identification on the outside of the bag. Pet. App. p. 7. The first item he found was a wallet, but he did not open the wallet to see

if it contained any identification. Pet. App. p. 7. Instead, he continued searching the bag and found a pair of dark-colored jeans that were wet around the cuffs, and a black handgun. Pet. App. pp. 7-8. Only then did Smithey open the wallet to find Jackson's identification. Pet. App. p. 8.

These factual circumstances correctly permitted the Iowa Supreme Court, upon its de novo review, to find that it was reasonable to believe Jackson was an overnight guest since no one in the apartment appeared alarmed by Jackson's presence. Pet. App. pp. 37-38. Jackson was wearing only pajama pants in December, and it was reasonable to conclude he had other clothing and possessions in the apartment. Pet. App. p. 38. Given Jackson's presence in the bedroom, it was reasonable to conclude his clothes were somewhere in the bedroom and likely in the backpack near the mattress. Pet. App. pp. 38-39. The Court recognized backpacks are often something overnight guests use for storing their personal possessions. Pet. App. p. 39. Finally, the Court determined it was reasonable to assume Jackson might have belongings in the apartment since Olson was hesitant to definitively answer whether there was a gun in the room. Pet. App. p. 39.

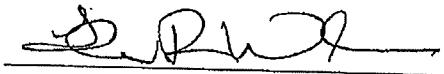
The question before the Iowa Supreme Court was not whether officers knew the backpack belonged to either Olson or Jackson. The question was whether officers had reason to believe it might have belonged to Jackson, rendering ambiguous Olson's apparent authority to permit a search of the backpack. The Iowa Supreme Court correctly determined officers had a duty to inquire, that they failed to do so, and that any evidence and fruit obtained from the search of the

backpack must be suppressed. Further review is not warranted.

CONCLUSION

For all of the reasons discussed above, Respondent respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,



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IN THE SUPREME COURT OF IOWA

STATE OF IOWA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	S.CT. NO. 19-1643
	)	
JEFFREY ALLEN BURDETTE JR.,	)	
	)	
Defendant-Appellant.	)	

APPEAL FROM THE IOWA DISTRICT COURT
FOR PLYMOUTH COUNTY
HONORABLE TOD DECK, JUDGE

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE

On the 13th day of February, 2020, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Jeffrey Burdette Jr., 216 Dover Ave. NE, Apt. 1, Orange City, IA 51041.

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TRW/sm/2/20

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because the issue raised involves substantial issues of first impression in Iowa. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c) (2019). Burdette asks this Court to set a "good cause" standard permitting a direct appeal of a guilty plea under Iowa Code section 814.6(1). In addition, he asks this Court to address the enforceability of guilty plea provisions that treat an appeal, a reconsideration of sentence, a postconviction application, or an application for federal habeas relief as a breach of the plea agreement.

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by Defendant-Appellant Jeffrey Burdette Jr. from his conviction, sentence, and judgment for Possession of a Controlled Substance – Second Offense, an aggravated misdemeanor in violation of Iowa Code section 124.401(5), entered following his guilty plea

in Plymouth County District Court. The Honorable Tod Deck presided over all relevant proceedings.

Course of Proceedings: On February 18, 2019, the State filed a trial information in Plymouth County District Court charging Defendant-Appellant Jeffrey Burdette Jr. with Introduction of a Controlled Substance into a Correctional or Jail Facility, a class D felony in violation of Iowa Code section 719.7(3) (2017) (Count I), and Possession of a Controlled Substance (Methamphetamine) – Second Offense, an aggravated misdemeanor in violation of Iowa Code section 124.401(5) (2017) (Count II). (Information)(App.). Burdette pleaded not guilty and waived his right to a speedy trial. (Written Arraignment)(App.).

On September 19, 2019, Burdette filed a written waiver of rights and guilty plea pursuant to a plea agreement with the State. (Waiver of Rights)(App.). Burdette agreed to plead to Count II as charged, while the State agreed to dismiss Count I and an accompanying simple misdemeanor. (Waiver

of Rights §§ 3, 10(N))(App.). The parties agreed Burdette would be sentenced to 365 days in jail with all but 60 days suspended, placed on probation for one year, and pay a fine of $625. (Waiver of Rights § 10(A), (B) (E))(App.). The plea agreement was binding on the District Court. (Waiver of Rights § 2)(App.). Burdette waived his right to file a motion in arrest of judgment, his right to a delay before sentencing, and his right to allocution. (Waiver of Rights pp. 7-8)(App.).

The District Court issued its judgment and sentence on September 19, 2019. (Judgment and Sentence)(App.). The court accepted Burdette's plea finding it was knowing and voluntary. (Judgment and Sentence p. 1)(App.). The court sentenced Burdette to 365 days in jail with all but 60 days suspended and placed him on probation for one year, with conditions relating to employment, substance abuse evaluation and treatment, drug court, and searches. (Judgment and Sentence § 2)(App.). The court ordered

Burdette to pay a fine of $625 with surcharge, a $10 DARE surcharge, a $125 Law Enforcement Initiative Surcharge, and court costs. (Judgment and Sentence § 2)(App.). The court also ordered Burdette to submit a DNA sample. (Judgment and Sentence § 12)(App.).

Burdette filed a timely notice of appeal on September 30, 2019. (Notice)(App.).

Facts: In his written plea, Burdette admitted that on December 2, 2018, in Plymouth County, he knowingly had the controlled substance methamphetamine in his possession and that he had one or more prior convictions for possession of a controlled substance. (Waiver of Rights p. 7)(App.). Burdette also agreed the District Court could rely upon the minutes of testimony to find a factual basis for his plea. (Waiver of Rights § 8)(App.).

According to the minutes of testimony, on December 2, 2018, a small baggy with a crystal-like substance was found near the booking counter of the Plymouth County Jail after

Burdette was booked into the jail. (Minutes p. 1 & Petersen Supp.)(Conf. App.). A review of the booking video showed Burdette dropping the bag from his hand onto the floor. (Minutes p. 1)(Conf. App.). The bag contained .5 grams of methamphetamine. (Minutes Petersen Supp.)(Conf. App.). Burdette had a prior conviction for possession of a controlled substance on August 1, 2014, in Plymouth Co. FECR015742. (Minutes pp. 1-2)(Conf. App.).

ARGUMENT

I. BURDETTE HAS GOOD CAUSE TO PURSUE THE DIRECT APPEAL OF HIS MISDEMEANOR GUILTY PLEA.

On July 1, 2019, Senate File 589 went into effect. 2019 Iowa Acts ch. 140 § 28; Iowa Const. art. III § 26. In particular, Senate File 589 amended Iowa Code section 814.6(1) to grant the right of appeal from a final judgment of sentence from "[a] conviction where the defendant has pled guilty" to a class "A" felony or in cases "where the defendant establishes good cause." Iowa Code § 814.6(1) (2019).

Burdette pleaded guilty and was sentenced on a misdemeanor offense on September 19, 2019. (Waiver of Rights; Judgment and Sentence)(App.). Accordingly, under the new restrictions on appeals, he must establish he has good cause to pursue his appeal.

A. "Good cause" should be interpreted broadly to protect defendants' constitutional rights to due process and equal protection.

"Good cause" is not defined in the statute, and the statute does not prescribe the procedure to be used by a defendant to establish good cause. Id. Thus, the determination of both is left to the discretion of the court. See Iowa Civil Liberties Union v. Critelli, 244 N.W.2d 564, 568–69 (Iowa 1976) (Iowa courts maintain an "inherent common-law power . . . to adopt rules for the management of cases on their dockets in the absence of statute.").

This Court should interpret "good cause" broadly and implement an adequate procedure to avoid due process and equal protection violations. Because "good cause" is not

defined or limited in the statute, the Court will give the term its common meaning. State v. Tesch, 704 N.W.2d 440, 451–52 (Iowa 2005) (citation omitted). "Good cause" is commonly defined as "[a] legally sufficient reason." Cause, Black's Law Dictionary (11th ed. 2019). It is a broad and flexible term found throughout Iowa law where its definition is situational and varies depending on the context in which it is being applied. See, e.g., Iowa R. Crim. P. 2.33 (2019) (providing violations of speedy indictment and speedy trial warrant dismissal unless "good cause to the contrary is shown."); Iowa R. Civ. P. 1.977 (2019) (stating the court may set aside default upon showing of "good cause"); Iowa Code §§ 322A.2 & .15 (2019) (providing motor vehicle franchise may not be terminated unless "good cause" is shown and identifying factors to evaluate in that determination); Iowa Code § 915.84(1) (2019) (allowing for waiver of time limitation to file for crime victim compensation if "good cause" is shown); State v. Winters, 690 N.W.2d 903, 907–08 (Iowa 2005) (discussing

that grounds for "good cause" to grant trial continuance is narrower in a criminal case where speedy trial rights are at stake than in a civil case); Wilson v. Ribbens, 678 N.W.2d 417, 420–21 (Iowa 2004) (discussing factors to be considered when determining if "good cause" has been shown to excuse failure of service pursuant to rule 1.302).

The court will usually interpret statutes in a way that avoids a constitutional problem. Simmons v. State Pub. Def., 791 N.W.2d 69, 74 (Iowa 2010). The legislature's assignment of discretion to the court to define "good cause" and implement the procedure to establish such cause ensures both can be accomplished in a manner consistent with constitutional dictates. An interpretation effectively prohibiting the right of appeal for defendants who plead guilty would raise concerns about due process and equal protection under both the Iowa and the federal constitutions. U.S. Const. amend. V; amend. XIV § 1; Iowa Const. art. I, §§ 6, 9.

Article V section 4 of the Iowa Constitution provides the Iowa Supreme Court shall have appellate jurisdiction, "under such restrictions as the general assembly may, by law, prescribe." Iowa Const. art. V, § 4. This court has long acknowledged the ability of the legislature to place limitations on the right to appeal. See In re Durant Comm. Sch. Dist., 252 Iowa 237, 245, 106 N.W.2d 670, 676 (1960) ("We have repeatedly held the right of appeal is a creature of statute. It was unknown at common law. It is not an inherent or constitutional right and the legislature may grant or deny it at pleasure."). See also Wissenberg v. Bradley, 209 Iowa 813, ___, 229 N.W. 205, 209 (Iowa 1929). The United States Supreme Court has held similarly. McKane v. Durston, 153 U.S. 684, 687-88 (1894) ("A review by an appellate court of the final judgment in a criminal case, however grave the offence of which the accused is convicted, . . . is not now a necessary element of due process of law.").

These holdings, however, are subject to criticism. See Cassandra Burke Robinson, The Right to Appeal, 91 N.C.L.Rev. 1219, 1221 (2013) (arguing U.S. Supreme Court has relied on "nineteenth century dicta" for the proposition that due process does not require a right of appeal and expressing concerns that states will attempt to eliminate appeals as of right "in order to save fiscal and administrative resources."); Marc M. Arkin, Rethinking the Constitutional Right to an Appeal, 39 UCLA L. Rev. 503 (1992); Jones v. Barnes, 463 U.S. 745, 756 n. 1 (1983) (Brennan, J. dissenting) (predicting that if the court were squarely faced with the issue, it would hold that due process requires a right to appeal a criminal conviction).

Even assuming the legislature can grant or deny the right to appeal at its pleasure, equal protection guarantees dictate that "[o]nce the right to appeal has been granted . . . it must apply equally to all. It may not be extended to some and denied to others." Waldon v. District Court of Lee County,

256 Iowa 1311, 1316, 130 N.W.2d 728, 731 (1964).

> There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. *Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations.*

Griffin v. Illinois, 351 U.S. 12, 18 (1956) (internal citations omitted) (emphasis added). See also Rinaldi v. Yeager, 384 U.S. 305, 310 (1966) (once right of appeal is established "these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts."); Shortridge v. State, 478 N.W.2d 613, 615 (Iowa 1991) (superseded by statute, 1990 Iowa Acts ch. 1043, § 1, as recognized in James v. State, 541 N.W.2d 864, 868 (Iowa 1995)) (finding statute

limiting right of appeal by inmate from denial of postconviction relief unconstitutional on equal protection grounds because State was not similarly limited). State v. Hinners, 471 N.W.2d 841, 843 (Iowa 1991) (defendant may waive right to appeal, but must do so voluntarily, knowingly, and intelligently to meet due process requirements).

The procedure by which the appeal is considered must also comport with due process. See Evitts v. Lucey, 469 U.S. 387, 400–01 (1985) ("The right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms. . . . In short, when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution-and, in particular, in accord with the Due Process Clause."): Billotti v. Legursky, 975 F.2d 113, 115 (4th Cir. 1992) (West Virginia's discretionary right of appeal did not violate due process because procedure for seeking appeal included right to court-

appointed counsel, preparation of transcripts, opportunity to present oral argument, and submission of written petition to the appellate court including statement of facts, procedure, assignments of error, and legal authority).[1]

Accordingly, whatever standard of "good cause" this Court chooses to adopt should be broad enough to protect defendants' right to due process and equal protection.

B. Burdette has established good cause to proceed with his appeal.

1. Burdette is not seeking to undo his plea, but to correct a sentencing error.

Burdette contends good cause exists in the context where a defendant is simply challenging his sentence and not trying to undo his guilty plea in its entirety. The spirit of the changes to Iowa Code section 814.6(1) appear to be aimed at defendants challenging and getting their guilty pleas undone

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[1]. Future application of the statute should accommodate the preparation of transcripts and an opportunity for appellate counsel to review the record and present legal and factual argument to the court to review when determining if good cause exists.

over what the legislature deemed technical violations, and at preventing frivolous appeals. See, e.g., Comments of Senator Dawson on SF589, House Amendment S-3213, available at https://www.legis.iowa.gov/dashboard?view=video&chamber=S&clip=s20190425031315902&dt=2019-04-25&offset=702&bill=SF%20589&status=r, starting at 3:25:28.

Importantly, the challenges raised by Burdette in this appeal, if successful, would not result in a reversal and undoing of his guilty plea; it would simply result in a remand to vacate one portion of his sentence that was not part of the plea agreement. If Burdette had gone to trial and received the same sentencing error, the Court could review his claim directly. This Court should not interpret section 814.6(1) as prohibiting appeals of sentencing errors not affecting the validity of the plea itself.

2. Burdette's sentencing claim is non-frivolous.

To satisfy a "good cause" standard, the defendant should not have to show that he would definitively win on the merits

of the claim he seeks to raise in the appeal. Instead, the court's consideration of whether good cause has been established should include whether the defendant has a colorable or non-frivolous claim. In other discretionary review situations, a petitioner does not have a burden to show he will ultimately prevail on the merits of the claim to get review granted. See Gibb v. Hansen, 286 N.W.2d 180, 188 (Iowa 1979) (Supreme Court considered claims raised in petition for writ of certiorari and ultimately ruled against petitioner and annulled writ); Farrell v. Iowa Dist. Court, 747 N.W.2d 789, 790-792 (Iowa Ct. App. 2008) (Supreme Court granted petition for writ of certiorari but petitioner ultimately lost on one issue and prevailed on others).

In this case, the District Court imposed a condition of probation that was not agreed to by the parties and violated the search and seizure clauses of both the state and federal constitutions as described in Issue II below. To prohibit an appeal in this case simply because Burdette pleaded guilty

would subvert the fair and equal application of the law. The record supports Burdette's claim, and he has established good cause for his appeal.

II. THE DISTRICT COURT IMPOSED AN ILLEGAL SENTENCE WHEN IT CREATED A CONDITION OF PROBATION ALLOWING GENERAL LAW ENFORCEMENT OFFICERS TO CONDUCT WARRANTLESS SEARCHES OF BURDETTE'S PROPERTY WITHOUT ANY INDIVIDUALIZED SUSPICION.

Preservation of Error: Void, illegal, or procedurally defective sentences may be corrected on appeal even absent an objection before the trial court. State v. Lathrop, 781 N.W.2d 288, 292-93 (Iowa 2010). A court's adoption of a condition of probation that exceeds statutory parameters is an illegal sentence. Id. at 294.

Scope of Review: Challenges to the legality of a sentence are reviewed for errors at law. State v. Sisk, 577 N.W.2d 414, 416 (Iowa 1998).

Merits: When Defendant-Appellant Jeffrey Burdette filed his written guilty plea in Plymouth County District Court, the plea contained the following condition of probation:

> The Defendant shall submit to a search of the defendant's person, car, and/or residence at any time during probation *by a probation officer pursuant to the rules or policies of the Iowa Department of Correctional Services;*

(Waiver of Rights § 10(E))(App.) (emphasis added). Burdette signed the form acknowledging he had read its contents. (Waiver of Rights p. 8)(App.).

When the District Court entered judgment on Burdette's plea, it adopted the terms of the plea agreement in most respects. (Judgment and Sentence)(App.). There was one difference, however, in the search provision mentioned above:

> The Defendant shall submit to a search of the defendant's person, car, and/or residence at any time during probation by a probation officer *or any law enforcement officer making such a request*;

(Judgment and Sentence § 2)(App.)(emphasis added). This change to Burdette's sentence rendered this portion of his sentence illegal.

To be illegal under Iowa Rule of Criminal Procedure 2.24(5)(a), a sentence must be one that is not authorized by

statute. Iowa R. Crim. P. 2.24(5)(a) (2019); Tindell v. State, 629 N.W.2d 357, 359 (Iowa 2001).

> The exclusion of illegal sentences from the principles of error preservation is limited to those cases in which a trial court has stepped outside the codified bounds of allowable sentencing. In other words, the sentence is illegal because it is beyond the power of the court to impose.

Tindell v. State, 629 N.W.2d at 359 (quoting State v. Ceasar, 585 N.W.2d 192, 195 (Iowa 1998) (citations omitted)). "The legislature possesses the inherent power to prescribe punishment for crime, and the sentencing authority of the courts is subject to that power. A sentence not permitted by statute is void." State v. Ohnmacht, 342 N.W.2d 838, 842 (Iowa 1983) (citations omitted).

Pursuant to Iowa Code section 907.6, courts have broad but not unlimited authority in setting conditions for probation. Iowa Code § 907.6 (2019); State v. Valin, 724 N.W.2d 440, 445 (Iowa 2006); State v. Lathrop, 781 N.W.2d 288, 293 (Iowa 2010). The courts may impose "'any reasonable conditions' that either 'promote rehabilitation of the defendant or the

protection of the community.'" State v. Valin, 724 N.W.2d at 445-46; Iowa Code § 907.6 (2019). A district court's discretion, however, must be exercised within legal parameters. State v. Lathrop, 781 N.W.2d at 294; State v. Formaro, 638 N.W.2d 720, 725 (Iowa 2002).

The Iowa Supreme Court has held that the warrantless search of a probationer's property or person by a general law enforcement officer, absent consent or an exception to the warrant requirement, violates article I section 8 of the Iowa Constitution. State v. Short, 851 N.W.2d 474, 503-06 (Iowa 2014). Nor is a standard "search condition" in a probation or parole agreement – standing alone – sufficient to permit a general law enforcement officer to search a person's residence at any time for any reason without any sort of particularized suspicion or limitations on the scope of the search. State v. Ochoa, 792 N.W.2d 260, 291 (Iowa 2010).

Although the Iowa Supreme Court has forged its own path on probation and parole searches under the Iowa

Constitution, even the United States Supreme Court has set limits on the warrantless searches of probationers:

> We hold that the balance of these considerations requires no more than reasonable suspicion to conduct a search of this probationer's house. The degree of individualized suspicion required of a search is a determination of when there is a sufficiently high probability that criminal conduct is occurring to make the intrusion on the individual's privacy interest reasonable. See United States v. Cortez, 449 U.S. 411, 418, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981) (individualized suspicion deals "with probabilities"). Although the Fourth Amendment ordinarily requires the degree of probability embodied in the term "probable cause," a lesser degree satisfies the Constitution when the balance of governmental and private interests makes such a standard reasonable. See, e.g., Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); United States v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975). Those interests warrant a lesser than probable-cause standard here. When an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable.

United States v. Knights, 534 U.S. 112, 121 (2001). While not deciding whether the existence of a "search condition" in

Knights' probation agreement amounted to a "waiver" of his Fourth Amendment rights, the Knights Court nonetheless referred to the provision as a "salient circumstance." Id. at 118.

The "general law enforcement officer search" provision in Burdette's judgment and sentence violates his rights against warrantless searches under both the state and federal constitutions. The provision purports to allow a general law enforcement officer to search Burdette's person or property for any reason and at any time without any showing of individualized or reasonable suspicion of criminal activity. There are no limitations on the scope of the officer's authority to search.

Burdette did not consent to the ability of a general law enforcement officer to search his person or property. See State v. Baldon, 829 N.W.2d 785, 792-94 (Iowa 2013)(discussing cases in other jurisdictions on the question of whether consent search provisions in probation agreements

constitute a waiver of search and seizure rights). It is true that Burdette's written guilty plea contained a provision for a *probation officer* to conduct warrantless searches pursuant to policies and rules established by the Department of Correctional Services. (Waiver of Rights § 10(E))(App.). The written plea did not, however, contain any such reference to searches by *general law enforcement officers*. (Waiver of Rights § 10(E))(App.). That provision was added by the District Court after the fact and therefore cannot serve as a basis for a finding of consent. (Judgment and Sentence § 2)(App.).

The portion of the judgment and sentencing order subjecting Burdette to warrantless searches by general law enforcement officers without any suspicion or other limitations is an illegal sentence. See State v. Bruegger, 773 N.W.2d 862, 871 (Iowa 2009)("a challenge to an illegal sentence includes claims that the court lacked the power to impose the sentence or that the sentence itself is somehow inherently legally

flawed, including claims that the sentence is outside the statutory bounds or that the sentence itself is unconstitutional"); State v. Lathrop, 781 N.W.2d 288, 293 (Iowa 2010)(same).

"Where a sentence imposed is severable, the court may strike the invalid part without disturbing the rest." State v. Hutt, 548 N.W.2d 897, 898 (Iowa Ct. App. 1996). Burdette asks this Court to vacate the portion of the sentence authorizing warrantless searches by general law enforcement officers as illegal and not envisioned by the plea agreement.

III. BECAUSE THE ISSUE MAY ARISE ON REMAND, THIS COURT SHOULD ADDRESS WHETHER IT WAS A BREACH OF THE PLEA AGREEMENT FOR BURDETTE TO APPEAL HIS SENTENCE.

Preservation of Error: Defendant-Appellant Jeffrey Burdette Jr. contends error was preserved by the filing of the notice of appeal, as no breach could have occurred until the notice was filed. (Waiver of Rights § 10(M); Notice)(App.).

Scope of Review: The District Court was not asked to review the provision in question, but the Supreme Court ordinarily reviews challenges related to contracts or guilty pleas for correction of errors at law. State v. Fisher, 877 N.W.2d 676, 680 (Iowa 2016). To the extent constitutional issues are implicated, review is de novo. State v. Ryan, 501 N.W.2d 516, 517 (Iowa 1993).

Merits: When Defendant-Appellant Jeffrey Burdette Jr. entered into a plea agreement with the State, the agreement was reduced to writing and filed with the District Court. (Waiver of Rights)(App.). The agreement contained the following provision:

> Should the Defendant request or pursue a reconsideration of sentence, file an appeal, request postconviction relief in this matter, or pursue any action for habeas corpus the parties hereby agree the State shall have the right to re-file or re-instate the original criminal charges pending against the Defendant prior to this plea agreement and the Defendant waives any speedy indictment as well as any speedy trial claims.

(Waiver of Rights § 10(M))(App.).

Burdette asks this Court to hold that this provision of his plea agreement is unenforceable for several reasons. First, it is not an appeal waiver and to the extent it attempts to create a waiver of the right to appeal, any such waiver is invalid. Second, to the extent contract principles are involved, the issue Burdette is raising on appeal and the relief he seeks do not amount to a substantial or material breach. Finally, there are serious ethical considerations that potentially preclude a plea attorney from advising his or her client on waiving future claims of ineffective assistance of counsel. These concerns should render "appeal as breach" provisions unenforceable as a matter of public policy.

A. Appeal waiver

A defendant can waive the right to appeal as part of a plea agreement. State v. Hinners, 471 N.W.2d 841, 845 (Iowa 1991). Even though the right to appeal is statutory, the Iowa Supreme Court has held that the waiver of the right to appeal should meet the same federal due process criteria required for

waiver of constitutional rights." Id. This means that the waiver must be voluntary, knowing, and intelligent, and an intentional relinquishment of a known right. Id. It is the State's burden to prove a valid waiver. State v. Loye, 670 N.W.2d 141, 147 (Iowa 2003).

A defendant does not waive the right to appeal simply by pleading guilty. Id. Rather, the waiver must be an express element of the agreement. Id. In this case, the written plea agreement did not expressly state that Burdette was waiving his right to appeal. Instead, it maintained his right to appeal but indicated that the State would essentially treat any appeal as a breach of the plea agreement. (Plea Agreement ¶ 10)(App.). The wording of the plea agreement cannot be interpreted as a waiver of the right to appeal.

Furthermore, even a valid waiver of appeal would not have insulated the error in this case from review. The United States Supreme Court has recognized that "no appeal waiver serves as an absolute bar to all appellate claims." Garza v.

Idaho, 139 S.Ct. 738, 744 (2019). Defendants retain the right, for example, to question the validity of the appeal waiver itself. Id. at 745.

The Fifth Circuit case of United States v. Leal is instructive. United States v. Leal, 933 F.3d 426 (5th Cir. 2019). Leal pleaded guilty to transportation of child pornography and the parties agreed the district court could order restitution as part of the sentence so long as the sentence was within the statutory maximum. Id. at 428. The agreement also included an appeal waiver. Id. The court issued an order for restitution that did not adequately analyze whether Leal's offense proximately caused the damages as required by law. Id. at 429, 431. Leal appealed. Id. at 429.

The Fifth Circuit applied the rule that a challenge to a sentence in excess of the statutory maximum would not be barred by an appeal waiver. Id. at 430. The rule was based on the court's inability to give effect to a sentence that is not

authorized by law. Id. at 430-31 (discussing United States v. White, 258 F.3d 374 (5th Cir. 2001). In Leal's case, the parties had agreed upon the sentence, contemplated that all promises within the agreement were legal, and assumed "that the non-contracting 'party' who implements the agreement (the district judge) will act legally in executing the agreement." Id. at 431. And yet the sentencing court did not act within the bounds of the law. Id. Citing Garza and decisions from seven other circuit courts, the Leal Court determined Leal's claim was not barred by his appeal waiver. Id.

The record does not establish Burdette knowingly and voluntarily waived his right to appeal. The language of the provision does not explicitly waive the right to appeal. If the breach provision of Burdette's plea agreement is interpreted as an attempted waiver of the right to appeal, it still does not preclude his challenge to a portion of his sentence that is not authorized by law.

B. Contract Principles

When the appellate courts consider challenges to a guilty plea, "[s]ometimes, when we conclude a conviction or sentence is improper on a particular record, we reverse the conviction and remand for resentencing to eliminate part of the sentence, while letting the balance of the sentence stand." State v. Ceretti, 871 N.W.2d 88, 96-97 (Iowa 2015). Sometimes the Court applies principles of contract law and vacates the entire agreement. Id. at 97 (citing cases where plea agreements included an illegal sentence as a material element of the agreement).

In State v. Ceretti, the Iowa Supreme Court vacated the entire plea agreement because Ceretti's merger challenge sought to "transform what was a favorable plea bargain in the district court to an even better deal on appeal." Id. In Ceretti's case, the State was permitted to "reinstate any charges dismissed in contemplation of a valid plea bargain, if

it so desires, and file any additional charges supported by the available evidence." Id.

"[A] classic rule of contract law [] is that a party should be prevented from benefitting from its own breach." United States v. Erwin, 765 F.3d 219, 230 (3d Cir. 2014)(quoting Assaf v. Trinity Med. Ctr., 696 F.3d 681, 686 (7th Cir. 2012)). Another principle of contract law, however, is that a party is not excused from enforcement of a contract if the other party's breach is not "material." 23 Williston on Contracts § 63.3 (4th ed., July 2018 Supp.); Restatement (Second) of Contracts § 237 (June 2018 Supp.). See also United States v. Hallahan, 756 F.3d 962, 973 (7th Cir. 2014)(non-breaching party may elect to terminate contract or seek performance if other party commits a material breach); United States v. Scruggs, 356 F.3d 539, 543 (4th Cir.2004)(an injured party is relieved of its obligations under an agreement upon a breach only if that breach is material).

> In determining whether a failure to render or to offer performance is material, the following circumstances are significant:
>
> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
>
> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
>
> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
>
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
>
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Restatement (Second) of Contracts § 241 (June 2018 Supp.). In short, a material breach is "one that deprives the non-breaching party of the benefit of its bargain." United States v. Davis, 393 F.3d 540, 546-47 (5th Cir. 2004); United States v. Scruggs, 356 F.3d at 543 (same).

Rescission of a contract is an extraordinary remedy available only when necessary to obtain equity. Clark v. McDaniel, 546 N.W.2d 590, 595 (Iowa 1996). "Three

requirements must be met before rescission will be granted: (1) the injured party must not be in default, (2) the breach must be substantial and go to the heart of the contract, and (3) remedies at law must be inadequate." Id.

If the State were to assert Burdette's appeal is a breach of the plea agreement, the State would bear the burden to prove a breach. United States v. Floyd, 428 F.3d 513, 516 (3d Cir. 2005)("The Government bears the burden of proving breach by a preponderance of the evidence."). The State cannot unilaterally determine if a breach has occurred; a prior judicial determination of breach of the plea agreement is required before Burdette's plea and sentence could be vacated to allow the State to proceed with the original charge. United States v. Lamanna, No. 15-0200, 2016 WL 616580, at *5 (W.D. Pa. Feb. 16, 2016)("The Court rules that the proper and fair procedural mechanism, under basic tenets of contract law, and which comports with due process requirements and public policy considerations, is for the Government to move to set aside the

plea agreement based upon a material breach in a timely manner, prior to re-indictment, by the Grand Jury."); United States v. Calabrese, 645 F.2d 1379 (10th Cir. 1981)("We believe that one requisite [due process] safeguard of a defendant's rights is a judicial determination, based on adequate evidence, of a defendant's breach of a plea bargaining agreement. The question of a defendant's breach is not an issue to be finally determined unilaterally by the government.").

Burdette contends any breach of the plea agreement in his case is not material or substantial. Neither the State nor Burdette agreed to the probation condition imposed by the District Court in its sentencing order. (Waiver of Rights § 10(M); Judgment and Sentence § 2)(App.). That is the only portion of the plea and sentence Burdette is challenging on appeal. Because the parties were completely unaware that the District Court would impose an unconstitutional condition of probation as a part of the sentence, it cannot be said a

challenge to that portion of the sentence materially or substantially breaches the plea agreement. If anything, the challenge raised by Burdette on appeal returns the parties to their original agreement.

Burdette complied with all the terms of the plea agreement except the "appeal as breach" provision. (Waiver of Rights § 10(M))(App.). The provision is not material to the benefit obtained by the State. The State was able to avoid the time and logistics involved with a trial. The State bargained for a guilty plea and a jail sentence with probation. Both parties agreed to the appropriate sentence, to which they expected the District Court to be bound. (Waiver of Rights §§ 2, 10)(App.). Neither party could have reasonably expected the District Court to impose an illegal condition of probation.

After the district court imposed the sentence, Burdette filed a notice of appeal. The State was served with the notice of appeal. (Notice)(App.). The State did not file a

motion to vacate the plea and sentence and reinstate the original charges. The prosecutor's inaction demonstrates the appeal challenging the imposition of sentence is not a material breach of the agreement. The State received the benefit of its bargain. See United States v. Kelly, 337 F.3d 897, 902 (7th Cir. 2003)("The standard for assessing the reasonable expectations of the parties is an objective one.").

C. Plea provisions that treat filing an appeal or requesting other remedial relief as a breach of the plea agreement implicate the rules of ethics and should be deemed unenforceable as a matter of public policy.

There is an inherent problem with guilty plea provisions that suggest appealing or filing for collateral relief is akin to a breach of the plea agreement that may not be apparent at first blush. Such provisions can create a conflict of interests for the plea attorney, and even implicate prosecutors in misconduct for placing plea attorneys into a conflict of interests. Because of the serious ethical implications for the legal profession, such provisions should be deemed unenforceable as a matter of public policy.

Conflicts of interests with current clients are discussed in Iowa Rule of Professional Conduct 32:1.7:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> ...
>
> (2) *there is a significant risk that the representation of one or more clients will be materially limited* by the lawyer's responsibilities to another client, a former client, or a third person or *by a personal interest of the lawyer.*
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) each affected client gives informed consent, confirmed in writing.

Iowa R. Prof'l Cond. 32:1.7 (2019) (emphasis added). The requirements for obtaining a valid waiver of a conflict are laid out in more detail in the Rule's comments:

> [18] Informed consent requires that each affected client be aware of the relevant

circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See rule 32:1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved....

Iowa R. Prof'l Cond. 32:1.7 cmt. 18 (2019)

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the

> representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Iowa R. Prof'l Cond. 32:1.7 cmt. 22 (2019).

In addition to the general rules on conflicts of interests relating to current clients, the Rules also specifically prohibit an attorney from making "an agreement prospectively limiting the lawyer's liability to a client for malpractice." Iowa R. Prof'l Cond. 32:1.8(h) (2019). Comment 14 to this Rule explains the problem:

> Limiting Liability and Settling Malpractice Claims
>
> [14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement....

Iowa R. Prof'l Cond. 32:1.8 cmt. 14 (2019).

Provisions such as the one contained in Burdette's written plea create a prohibited conflict of interests for plea counsel. Although not technically an appeal waiver, the

provision punishes a defendant for exercising the right to appeal or the right to file for postconviction relief. Yet direct appeals and postconviction proceedings have traditionally been forums in which a defendant can try to establish that his plea counsel provided ineffective assistance. See Iowa Code §§ 814.6(1), 814.7 (2017-2019). Such provisions limit the defendant's ability to raise claims of ineffective assistance of counsel and therefore create a limitation upon plea counsel's future liability. This would appear to be a violation of both Rule 32:1.7 and Rule 32:1.8.

The ethical problems created by "appeal as breach" provisions similar to the one in this case are not limited to defense counsel. The prosecutor may also violate the rules of ethics when he or she proffers a plea agreement that would create a conflict of interests for defense counsel. Rule 32:8.4 says "[i]t is professional misconduct for a lawyer to ... violate or attempt to violate the Iowa Rules of Professional Conduct,

knowingly assist or induce another to do so, or do so through the acts of another...." Iowa R. Prof'l Cond. 32:8.4(a) (2019).

In October 2012, the National Association of Criminal Defense Lawyers issued a formal opinion on the related subject of appeal waivers. NACDL Ethics Advisory Committee, Formal Opinion 12-02 (Oct. 2012), available at https://www.nacdl.org/getattachment/1243403b-1775-4d2b-b559-4644d6951845/no-12-02-plea-agreements-barring-collateral-attack-as-adopted-.pdf [hereinafter NACDL Opinion]. The opinion, which focused on plea agreements barring collateral attacks under the federal habeas statute, determined it was unethical for defense counsel to participate in such agreements and for prosecutors to propose or require them. NACDL Opinion at 1.

The Committee began by reviewing the case law on appeal waivers in federal court and noticed three general trends. NACDL Opinion at 2. One set of cases sustained appeal waivers, but only as long as they did not bar federal

habeas claims. NACDL Opinion at 2. Another set found such waivers to be generally enforceable, while the last court left the question open. NACDL Opinion at 2-3. None of these cases, however, addressed the specific question of whether it was ethical for plea counsel to allow a client to enter into an appeal waiver. NACDL Opinion at 4.

The Committee determined appeal waiver provisions created a conflict of interests in violation of Model Rule of Professional Conduct 1.7(a) because plea counsel "is advising the client to waive his or her rights to challenge the constitutional effectiveness of the lawyer." NACDL Opinion at 4-5. The Committee also described such provisions as "prospective attempts at limiting liability of the lawyer to the client" in violation of Model Rule of Professional Responsibility 1.8(h)(1). NACDL Opinion at 5. The Committee recognized that "[a]n ineffective assistance claim is not strictly a malpractice claim, but a successful ineffective assistance claim is a predicate to suing a criminal defense lawyer for

malpractice in virtually all jurisdictions." NACDL Opinion at 5. See, e.g., Kraklio v. Simmons, 909 N.W.2d 427, 434 (Iowa 2018)(identifying four prongs for legal malpractice claim against attorney).

Likewise, the Committee determined prosecutors had a duty under Model Rule of Professional Conduct 8.4 not to try to limit ineffective assistance claims. NACDL Opinion at 6. "When a prosecutor proposes a plea agreement limiting ineffective assistance claims, the prosecutor creates a situation where the criminal defense lawyer has a conflicting duty to the client and a personal interest to avoid being accused of ineffective assistance." NACDL Opinion at 6.

The Committee reviewed ethics opinions from various states on the subject and found them to be in accord. NACDL Opinion at 6-7. See, e.g., Alabama Op. RO 2011-02 (2011); Arizona Op. 15-1 (2015); Florida Op. 12-1 (2012); Kansas Op. 17-02 (2017); Kentucky Op. KBA E-435 (2014); Mississippi Op. 260 (2014); Missouri Op. 126 (2009); Nebraska Op. 14-03

(2014); Nevada Formal Op. 48 (2011); North Carolina Op. RPC 129 (1993); Ohio Op. 2001-6 (2001); Tennessee Op. 94-A-549 (1995); Texas Op. 571 (May 2006); Utah Op. 13-04 (2013); Vermont Op. 95-04 (1995); Virginia Op. 1857 (2011).

Finally, the Committee also opined that such plea agreement provisions violated the Sixth Amendment right to unconflicted counsel and the right to due process under the Fifth and Fourteenth Amendments. NACDL Opinion at 7 (citing Holloway v. Arkansas, 435 U.S. 475, 480-490 (1978)).

Given the serious ethical implications of these "appeal as breach" provisions, this Court should deem their terms unenforceable as a matter of public policy.

Iowa courts presume that a contractual agreement is binding on the parties. P.M. v. T.B., 907 N.W.2d 522, 537 (Iowa 2018). "Contracts that contravene public policy will not be enforced," but the power to invalidate a contract in such circumstances must be used cautiously in recognition of the

parties' freedom to contract. Rogers v. Webb, 558 N.W.2d 155, 156-57 (Iowa 1997).

The Restatement (Second) of Contracts provides:

> (1) A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.
>
> (2) In weighing the interest in the enforcement of a term, account is taken of
>
> (a) the parties' justified expectations,
>
> (b) any forfeiture that would result if enforcement were denied, and
>
> (c) any special public interest in the enforcement of the particular term.
>
> (3) In weighing a public policy against enforcement of a term, account is taken of
>
> (a) the strength of that policy as manifested by legislation or judicial decisions,
>
> (b) the likelihood that a refusal to enforce the term will further that policy,
>
> (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and
>
> d) the directness of the connection between that misconduct and the term.

Restatement (Second) on Contracts § 178 (2019). Notably, the Restatement also specifically refers to a promise that tends to induce a violation of fiduciary duty as being unenforceable

as a matter of public policy. Restatement (Second) on Contracts § 193 (2019).

A defendant has a constitutional right to counsel free from actual conflicts of interests. U.S. Const. amends VI, XIV; Iowa Const. art. 1 § 10; Cuyler v. Sullivan, 446 U.S. 335, 348 (1980); State v. Smitherman, 733 N.W.2d 341, 345-46 (Iowa 2007). As discussed above, the Iowa Rules of Professional Conduct recognize it is a conflict of interests for plea counsel to limit a client's ability to claim plea counsel ineffective and thereby limit plea counsel's future liability for malpractice. Iowa Rs. Prof'l Cond. 32:1:7, 32:1.8 (2019). Such provisions also run afoul of plea counsel's fiduciary duty to protect the interests of the client.

The Iowa Supreme Court has the inherent power to regulate the bar. Wunschel Law Firm v. Clabaugh, 291 N.W.2d 331, 334 (Iowa 1980). The Iowa Supreme Court has previously used that inherent authority to void as unenforceable a contingency fee contract that did not comport

with the disciplinary rules' requirement that the fee be reasonable. Id. at 336. Should this Court deem Burdette's "appeal as breach" provision likewise violates Iowa's ethics rules for attorneys, the Court should deem the provision unenforceable as a matter of public policy and as a deprivation of constitutional protections.

Although the "appeal as breach" provision is an unenforceable term of the plea agreement, that does not invalidate the remainder of the agreement. According to the Restatement:

> (1) If less than all of an agreement is unenforceable under the rule stated in § 178, a court may nevertheless enforce the rest of the agreement in favor of a party who did not engage in serious misconduct if the performance as to which the agreement is unenforceable is not an essential part of the agreed exchange.
>
> (2) A court may treat only part of a term a[s] unenforceable under the rule stated in Subsection (1) if the party who seeks to enforce the term obtained it in good faith and in accordance with reasonable standards of fair dealing.

Id. § 184 (2019).

Burdette did not commit any misconduct in relation to the "appeal as breach" provision. Two attorneys were involved in incorporating this provision into the plea agreement – plea counsel and the prosecutor. As described above, plea counsel would have been operating under a conflict of interests in advising Burdette whether or not to agree to the provision. The prosecutor would have been committing misconduct by placing plea counsel under a conflict of interests. Burdette would have had no reasonable understanding of what he was giving up had he not been properly advised by conflict-free counsel.

Nor would excising this provision from Burdette's written plea upset an essential part of the agreement. As discussed above, the State obtained the benefit of its bargain. If the State considered the "appeal as breach" provision to be essential, it would have already moved to vacate Burdette's plea based on the filing of his notice of appeal. It did not do so because the provision was never a material and substantial

part of the plea agreement. Accordingly, this Court should deem the "appeal as breach" provision to be unenforceable as a matter of public policy.

CONCLUSION

For all of the reasons addressed above, Defendant-Appellant Jeffrey Burdette Jr., respectfully requests this Court vacate that portion of his sentence allowing general law enforcement officers to conduct warrantless searches of his person and property as a condition of his probation. Burdette also asks this Court to void as unenforceable Section 10(M) of his Written Waiver of Rights purporting to treat an appeal or other requests for relief as a breach of the plea agreement.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

BEFORE THE GRIEVANCE COMMISSION OF THE SUPREME COURT OF IOWA

IOWA SUPREME COURT ATTORNEY DISCIPLINARY BOARD, Complainant vs. DAVID J. ISAACSON Respondent.	))))))	DOCKET NO. 640 FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION OF GRIEVANCE COMMISSION

This matter came on for hearing before the 360th Division of the Grievance Commission on December 6 and 7, 2007, in the Judicial Building in Des Moines, Iowa. Commission members to whom evidence was submitted were: Attorney Kirk C. Quinn, Attorney Mark L. Tripp; Attorney Theresa R. Wilson; and Layperson Jacquie Easely, and President, Loretta L. Harvey. The Board was represented by Attorney David J. Grace. The Respondent was present and represented by his attorneys David L. Brown and Alexander E. Wonio.

The complaint was filed by the Board on or about April 30, 2007. Respondent filed an Answer on or about May 30, 3007. A Motion for Leave to Amend was filed on or about July 11, 2007. The Respondent filed a Resistance to Complainant's Motion for Leave to Amend Complaint (Request for Immediate Oral Hearing) on or about July 20, 2007. On July 25, 2007, oral arguments were made before the President of the Division by telephone conference call. The President filed a Ruling on or about August 1, 2007 granting the Motion to Amend the Complaint. The Amendment to the Complaint was filed by the Board on or about August 1, 2007. The Respondent filed an Answer to the Amended Complaint on or about September 10, 2007.

At the hearing the Board called two witnesses, Thomas Clarke and David Isaacson. The Respondent's counsel cross examined Thomas Clarke. At the commission's direction the Respondent's counsel was allowed to simultaneously perform cross-examination and direct examination of Mr. Isaacson. No other witnesses were called by the Board or the Respondent. The deposition transcript of Kelly Belz was entered into evidence by the Board.

FINDINGS OF FACT

Count I Conversion of Client Funds

Count 1 of the original Complaint was based on allegations of Conversion of Client Funds. In 2003, the Respondent represented Kelly G. Belz as plaintiff in a case against Robert

Young and Sons which settled with defendants agreeing to make payments to Belz. The basic crux of the case was that Mr. Belz wanted Robert Young and Sons evicted from the car dealer lot that Mr. Belz owned for the failure to make payments in connection with a lease between the parties.

On or about September 30, 2003, the parties reached an agreement to settle the matter. In addition to reclaiming the use of his property, Mr. Belz was to be paid a total of $7,100.00 in installments. Mr. Isaacson testified that he delivered the settlement documents to Mr. Belz on or about that time, and delivered to him the first payment in the amount of $1,500.00 minus attorney fees and expenses. The records submitted into evidence by the Board and Isaacson do not reveal what bank cashed the $1500 payment. There is no evidence that the $1500 was deposited into Isaacson's trust account. On the Board's Exhibit 1-C, page 10, the evidence shows that Isaacson was paid $816 from Kelly Belz and personally kept $616 cash and deposited $200 cash into Isaacson's personal account. In reviewing the Board's Exhibit 1-D, Kelly Belz's billing statement was actually $822.18. Thus the office account and or Isaacson collected less fees and expenses than billed.

On or about November 18, 2003, Mr. Isaacson received the second installment from the Young's pursuant to a check in the amount of $3,000.00. Mr. Isaccson testified that as per the request and direction of his client, Mr. Belz, Mr. Isaacson was to cash the check and make arrangements to deliver the cash money to Mr. Belz. Mr. Isaacson deposited the check into his personal account. (Board's Exhibit 1-C, page 11). Although neither Mr. Isaacson nor Mr. Belz was sure of the exact date, Mr. Isaacson testified that he provided the $3,000.00 settlement disbursement in case to Mr. Belz as requested. Mr. Belz acknowledged receiving the cash. (Respondent's Exhibit B) Again the settlement installment was not deposited into Isaacson's trust account.

On or about December 26, 2003, Mr. Isaacson received the third installment from the Young's pursuant to a check in the amount of $2,600.00. Again, Isaacson testified that as per the request and direction of his client, Mr. Belz, Mr. Isaacson was to cash the check and make arrangements to deliver the money to Mr. Belz. Mr. Isaacson again deposited the check into his personal account on December 30, 2003 (Board's Exhibit 1-C, page 12) and attempted to make arrangements to deliver the money to Mr. Belz. Mr. Isaacson testified tha Mr. Belz instructed Mr. Isaacson "not to make a special trip."

Mr. Isaacson testified that the two parties did not meet for several weeks and, prior to going on a trip, Mr. Isaacson telephoned Mr. Belz and again asked if he wanted him to bring the remaining cash money to him before his trip. Mr. Belz again instructed Mr. Isaacson not to make

a special trip, and that the two would get together sometime after he returned because he also has some separate business to discuss with him.

Several months passed and the two parties had still not gotten together and exchanged the final settlement monies. Mr. Belz telephone Mr. Isaacson in June of 2004 and left a message to "call him back." Shortly thereafter Mr. Isaacson met with Mr. Belz, delivered to him the balance of the settlement monies in cash, and discussed separate legal matters with Mr. Belz and one of his employees.

Mr. Belz executed an Affidavit which was offered into evidence by Mr. Isaacson as Respondent's Exhibit B. The affidavit clearly set forth the arrangements made between Isaacson and Belz. In the affidavit Mr. Belz stated it is common in his businesses (autos and real estate construction) to make cash transactions, even in large amounts. Mr. Isaacson received, cashed, and delivered cash payments to Mr. Belz for settlement of the Young matter. Mr. Belz has been paid the entirety of sums owned to him under the terms of the settlement agreement by Mr. Isaacson. Mr. Belz approved of the extension of times encountered for payment of monies owed to him under the settlement agreement. Mr. Belz was in no way unhappy with or critical of the services he was proved by Mr. Isaacson, including the payment and finalization of the Young matter. Mr. Belz continues to engage Mr. Isaacson to assist him and other family members in variety of other matters.

Kelly Belz did not personally testify at the hearing. However, his deposition was taken prior to the hearing and the transcript was admitted as part of the evidence.

Mr. Belz's recollection was that the first two payments under the settlement were provided to him in cash in 2003, and the final payment made in 2004 (Belz Dep. 14). Any time between when Mr. Isaacson received a settlement payment from the Young's and provided it in cash to Mr. Belz was approved by Mr. Belz (Belz dep. 18). Mr. Belz had absolutely no complaints concerning Mr. Isaacson, his representation of Mr. Belz, or how the settlement was handled (Belz dep. 43).

The Commission notes that Mr. Clarke, the author of this complaint to the Board, admitted, under oath that had he known what Mr. Belz's Affidavit (Exhibit B) contained, he would not have filed a Complaint with the Board as the client was satisfied and had been paid all monies owed under the settlement agreement.

The Commission further finds that the complaint to the Disciplinary Board was initiated by Thomas Clarke, former law partner of Isaacson, through Clarke's counsel, Harvey Harrison. The Board did not present any evidence that Kelly Belz submitted a complaint against Isaacson to

the Disciplinary Board. Further, the Board did not present any evidence that Kelly Belz was misrepresented by Isaacson or harmed by Isaacson.

COUNT I – Paragraph 14 from Amended Complaint

Misrepresentation - Client Security Form

The Board claimed Mr. Isaacson falsely answered questions 11 and 16 on his Client Security Questionnaire. These questions, answered "yes" by Mr. Isaacson, read as follows:

11. Do you keep all funds of clients for matters involving the practice of law in separate interest bearing trust accounts located in Iowa?

16. Are books and records relating to funds of clients preserved for at least six years after completion of the employment to which they relate?

As previously mentioned, Mr. Belz requested that all settlement proceeds be provided to him in cash. Mr. Belz also consented to any delays from the time Mr. Isaacson received the money until he completed the cash transaction. Mr. Isaacson testified that he believed that he accurately answered the questions posed on the form.

COUNT II

Partnership Issues

Mr. Isaacson and Mr. Thomas Clarke maintained a joint office and legal partnership for a period of many years. The partner's mutual working agreement detailed that overhead bills would be split (varying in percentage), but that each lawyer would be solely entitled to the fees he earned. The partnership was terminated on or about July 9, 2004. The parties had, and continue to have, a civil dispute regarding payments owed after the termination of the partnership. Each party believes that they are owed significant monies from the other party.

At the time the partnership was terminated, the client trust account in the name of the partnership was also terminated. The parties continued to collect money from clients for services performed while the partnership was intact. Each party deposited these funds into separate accounts in their name only.

BURDEN OF PROOF

The Board must establish by a convincing preponderance of evidence that Respondent has violated the Code as charged. Iowa Supreme Ct. Bd. Of Prof'l Ethics and Conduct v. Sikma, 533 N.W. 2d532, 535 (Iowa 1995). This burden is greater than that in an ordinary civil action,

but less than is required in a criminal prosecution. Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Postma, 555 N.W. 2d 680, 681 (Iowa 1996).

CONCLUSIONS OF LAW

Count I – Conversion of Funds

Neither the Board nor the Respondent dispute the fact that Mr. Isaacson did not deposit the settlement monies into the Isaacson Trust Account. While the Commission members recognize that Mr. Isaacson was following the direction of this client by converting the money into cash, Mr. Isaacson still had a duty and obligation to follow the Code of Professional Responsibility. DR 9-102 clearly states that the money should be deposited into an interest bearing trust account.

Further, the Code provides in DR 9-103 that a lawyer shall maintain books and records of the trust account. Mr. Isaacson was not able to provide a ledger or record of the settlement monies being deposited into the trust account.

Failure to deposit the settlement monies into the trust account and maintain a record of such has resulted in the Respondent violating two disciplinary rules. Therefore, the conduct of the Respondent violated the following provisions of the Iowa Code of Professional Responsibility for Lawyers:

A)

B. DR 9-103 Required Books and Records; Required Certificate.

C. DR 1-102 (A)(1) A lawyer shall not violate a disciplinary rule.

COUNT I – Client Security Form
(Paragraph 14 of Amended Complaint)

The Board alleges that Mr. Isaacson intentionally misrepresented the Bar in his answers on the Client Security Form. The Commission agrees with the Board that the form was incorrectly answered. Since Mr. Isaacson should have deposited client funds of a settlement the answers were not accurately answered on the form. However, the Board failed to meet its burden of proof in showing misconduct of Mr. Isaacson as alleged on the amended complaint in paragraph 14. The Commission does not find that Mr. Isaacson's answering of the client security form demonstrated conduct involving dishonesty, fraud, deceit, or misrepresentation. Further, the

Commission does not find that his actions were prejudicial to the administration of justice or adverse to his fitness to practice law. Therefore, the Commission does not find any violations of DR 1-102 (A)(4),(5),(6) and recommends that paragraph 14 of the Amended Complaint be dismissed.

COUNT II – Partnership Issues

Testimony of Mr. Isaacson and Mr. Clarke made it apparent that the termination of their partnership has been a contentious issue. Mr. Clarke was admittedly angry with Mr. Isaacson. His frustrations are commonplace in business partnership terminations. However, this affects Mr. Clarke's credibility and the weight given to any testimony as he clearly has resentment towards his former business partner.

After hearing all the evidence, it appears the unresolved dispute between the former partners is best suited for the civil arena.

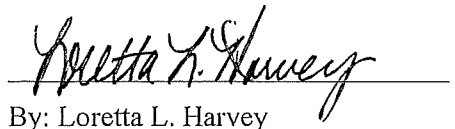
The Commission finds that there is no basis to impose sanction on Mr. Isaacson based on disputes existing between the parties when the partnership was terminated by Mr. Clarke.

The Commission does not find any violations of DR 1-102(A) and recommend that Count II of the Amended Complaint be dismissed.

Recommendation

After having reviewed the evidence, examined the record in this matter, and heard the arguments of counsel, the Commission, in accordance with Grievance Commission Rules and specifically Rule 36.15, hereby makes the recommendation that a Public Reprimand be issued for a violation of DR 9-102, DR 9-103 and DR 1-102 (A)(1) by Mr. Isaacson. The Commission is a aware of the Respondent's prior suspension in 1997. (See Board's Exhibit 1) This Commission distinguishes the two matters in that the prior case involved a complicated scenario of facts and the doctrine of Issue Preclusion. Furthermore the case in 1997 did not involve the attorney's trust account and the deposit of client funds. In the case before this Commission the Board did not meet its burden of showing that the Respondent demonstrated repetitive behaviors of dishonesty or fraud. Further since the Respondent did not harm his client the Commission is not concerned that future clients will be harmed by the Respondent. The Commission further recommends that paragraph 14 of the Amended Complaint and Count II of the Amended Complaint be dismissed.

360th Division of the Grievance Commission



By: Loretta L. Harvey
President of the 360th Division
Grievance Commission of the Supreme Court of Iowa

Wilson, T., dissenting

While I agree with various parts of the Division's majority opinion, I must respectfully dissent as to other parts.

I concur with the majority's opinion under Count I of the original complaint, in which it held Respondent failed to deposit client funds in a trust account, failed to maintain books and records of the trust account. These actions violated Iowa Code of Professional Responsibility DR-9-102, DR 9-103, and DR 1-102(A)(1), (5) & (6).

I respectfully disagree with the majority's findings under Count I paragraph 14 of the Amended Complaint. Respondent did not correctly answer the questions on the client security form regarding placement of client settlement money in his trust account. The majority found the false answers were made without any bad intent and did not impact the administration of justice or Respondent's fitness to practice law.

I find that Respondent's answers were false and did impact the administration of justice. The Client Security Commission relies upon honest and accurate answers on the form to determine whether it is necessary to investigate or audit a trust account. A false answer in this regard, whether intentionally or negligently made, impacts the ability of the Client Security Commission to monitor the activities of attorneys. See Comm. on Prof'l Ethics & Conduct v. Baudino, 452 N.W.2d 455, 458-59 (Iowa 1990)(holding false answers on client security form, even if negligently made, may warrant discipline). Because Respondent's false answers do impact the administration of justice, I would find he violated DR 1-102(A)(5).

As to the partnership issues addressed in Count II of the amended complaint, I am somewhat sympathetic to the majority's statement that these issues could have been addressed in the civil arena. There is something to be said for prosecutorial discretion. Nonetheless, the Board chose to prosecute the partnership issues and therefore I will address the merits of the complaint.

First, I respectfully disagree with majority's statement regarding the weight to be given Thomas Clarke's testimony. Mr. Clarke admitted he was angry at Respondent. That anger was derived from what he perceived as unethical practices by Respondent and therefore I do not find his anger to be unreasonable to the extent it lessens his credibility in any way. Respondent also expressed extreme frustration, at a minimum, with Mr. Clarke and his practices during their partnership. The bad feelings appear to be a two-way street. Aside from whatever personal dislikes and disagreements Mr. Clarke and Respondent may have, the Board was able to produce documentation that corroborated Mr. Clarke's concerns about Respondent's conduct.

The evidence presented at the hearing established that during their partnership Mr. Clarke and Respondent had trust accounts and an office account. The office account was used to pay overhead. All fees paid by clients were to go directly into the office account so that payments by clients would be properly credited to them and so that the money would be available for payment of overhead. At the time of the events in this case, both Mr. Clarke and Respondent were to pay $4,500 per month toward the overhead. Once that obligation was met, each attorney could withdraw whatever amount of his earned fees remained.

During 2003 and 2004, Respondent failed to deposit various fee payments made to him in the office account and instead deposited the payments into his personal bank

account. The Belz fee payment of $816 was one of the deposits Respondent kept personally. Bd. Ex. 1C p. 10. Respondent also deposited a check from White for $642.50 into his personal bank account on September 30, 2003. Bd. Ex. 1C p. 10. Mr. Clarke testified that White was a client and as of September 11, 2003, owed the partnership $642.50 in fees and costs. Bd. Ex. 43. Likewise, Respondent deposited a check from Hibbs for $255 into his personal bank account on September 30, 2003. Bd. Ex. 1C p. 10. Mr. Clarke testified Hibbs was also a client and that as of September 23, 2003, Hibbs owed the partnership $255. Bd. Ex. 44. Respondent admitted making these deposits of client fee money into his personal bank account and not informing the partnership.

Board Exhibit 13 was prepared by Mr. Clarke's office and admitted by the Board to compare Respondent's bank deposit records with the partnership's ledgers. The exhibit indicates that Respondent deposited $73,761.92 from partnership clients with outstanding bills totaling $142,047.75. Bd. Ex. 13 p. 4.

As a result of Respondent's decision to put client fee payments into his personal account instead of the office account, the partnership would not have recognized any payments made by the clients. Accordingly, clients would be double-billed – once by Respondent and once by the partnership. This happened on the Hibbs account, where Respondent personally deposited a fee payment of $255 into his personal account and then the partnership later removed $390 from the Hibbs trust account, not having been made aware of the prior payment. Bd. Exs. 1C p. 10, 44, 45. This resulted in a double payment of $255 by Hibbs. Respondent admitted the partnership records did not show the fee payments as being made by either White or Hibbs.

Another result of Respondent's actions was that he had less fee money going to the office account and therefore less money available for payment of his share of overhead. At the end of September 2003, Respondent owed $2,898.98 in overhead. Bd. Ex. 26. By the end of August 2004, Mr. Clarke estimated Respondent's unpaid share of overhead amounted to $18,700. Bd. Ex.18.

Respondent claimed that since he rejoined the partnership in 1997, following an earlier suspension, he and Mr. Clarke had an agreement to divide overhead and nothing more. He testified that all of their clients were separate and all of his fees were his earned income. This conflicts with the testimony of Mr. Clarke, who said that the earlier written partnership agreement called for the payment of fees into the office account and that they continued to abide by the agreement after Respondent returned from suspension. I find Mr. Clarke's testimony in this regard to be more credible. Operating as Respondent suggests would have made it virtually impossible for the partnership to keep track of client fee payments and would have regularly resulted in the sort of double-billing that occurred due to Respondent's actions in this case.

It is an ethical violation for an attorney to deposit into his personal account money that is intended for his law firm. Iowa S. Ct. Bd. of Prof'l Ethics Conduct v. Huisinga, 642 N.W.2d 283, 286-87 (Iowa 2002). There is no real dispute in this case that Respondent would have been entitled to the fees he had earned once his share of the overhead had been paid. Respondent's actions, however, clearly indicate an intent to avoid payment of his office overhead and pocket the entire amount of his earned fees contrary to his agreement with Mr. Clarke. See Iowa S. Ct. Bd. of Prof'l Ethics Conduct v. Irwin, 679 N.W.2d 641, 644 (Iowa 2004)(finding ethical violations where attorney

deposited earned fees into his personal accounts in contravention of agreement with his law firm).

Accordingly, I find that the evidence is sufficient to establish Respondent violated Iowa Code of Professional Responsibility DR 1-102(A)(4), (6).

I find the evidence is not sufficient to establish any violation with respect to payments Respondent was alleged to have made to his daughter through the partnership account. Mr. Clarke admitted that Respondent's daughter did work for Respondent from time to time and that Respondent would pay her from his personal account. Mr. Clarke initially testified that she never worked for the partnership as a legal assistant, but later admitted that she may have clerked for Respondent but did not recall her working for him. The evidence is not sufficient to establish any ethical violation on this ground.

In summary, I would find Respondent violated DR-9-102, DR 9-103, and DR 1-102(A)(1), (5) & (6) as alleged in Count I of the original complaint, DR 1-102(A)(5) as alleged in Count I paragraph 14 of the amended complaint, and DR 1-102(A)(4), (6) as alleged in Count II of the amended complaint.

The Iowa Supreme Court will often revoke the licenses of attorneys who convert funds entrusted to them, even when the funds are due to the law firm as opposed to a client. Id. at 644. The Court will sometimes impose a lesser sanction when the attorney admits his offending conduct and attempts to rectify the situation. Iowa S. Ct. Bd. of Prof'l Ethics Conduct v. Huisinga, 642 N.W.2d 283, 287 (Iowa 2002).

There are several mitigating factors present in this case. Respondent has admitted that he should have placed the Belz settlement money in his trust account and further acknowledges that he will no longer make cash payments to clients. With respect to Belz, no harm appears to have been done to the client. Finally, the partnership with Mr. Clarke is now terminated and it is unlikely such problems as alleged in Count II of the amended complaint will reoccur.

Offsetting these mitigating factors are very serious aggravating factors. Respondent's defense appears to be based upon the premise that his client, Belz, was happy and fully satisfied and therefore "no harm, no foul." An attorney has an obligation not only to his client, but to the public, the bar, and the courts. A client's acquiescence can neither condone nor remedy unethical behavior. While any harm to a client would certainly be an aggravating factor to consider, it is not necessarily the corollary that no harm to the client means no sanction is warranted.

The misconduct alleged under Count II of the amended complaint happened repeatedly. Respondent's depositing client fees into his personal bank account as opposed to his partnership account was not a one-time occurrence. Rather, Respondent appears to have actively hid funds from the partnership in order to avoid payment of overhead and to pocket the full amount of fees. His actions would have naturally resulted in the double-billing of clients. This sort of intentional and repeated misconduct warrants a more severe sanction.

Finally, Respondent previously received a six-month suspension for violating several rules of professional conduct relating to fraud and misrepresentation. Bd. Ex. 3.

Based upon these findings, I would recommend Respondent's license be suspended with no possibility of reinstatement for 18 months.

Theresa R. Wilson
Member, 360th Division
Grievance Commission of the Iowa Supreme Court